

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY D. MCCRARY,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 230907

Wayne Circuit Court

LC No. 00-002005

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and aggravated stalking, MCL 750.411i. The trial court sentenced defendant to ten to twenty years' imprisonment for the first-degree home invasion conviction, and to three years and four months to five years for the aggravated assault conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court punished him for his pretrial request for new counsel by banning plea negotiations and imposing a harsh sentence. Defendant relies on the trial court's remark, "I'll remember you," as well as the court's comment that it agreed with the complainant that defendant should not receive a plea agreement.

Defendant did not object to the trial court's conduct in the lower court. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "Where a defendant knows of a basis for disqualification prior to trial and fails to move for disqualification, the issue is not preserved for appeal." *People v Ensign (On Rehearing)*, 112 Mich App 286, 290; 315 NW2d 570 (1982). Further, defendant did not raise this issue at sentencing nor did he file a motion to vacate his sentence prior to bringing the instant appeal. *People v Lipps*, 167 Mich App 99, 111; 421 NW2d 586 (1988). Because defendant failed to preserve this issue, we review defendant's claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999); *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001).

We find no error. Defendant's claim that the trial court "banned" further plea negotiations mischaracterizes the record. The court merely indicated its approval of the prosecution's decision not to make any further plea offers. Moreover, the trial court's remarks occurred before trial. Our review of the trial record reveals no impropriety or indication of bias on the part of the trial court, and the sentencing transcript is void of any reference to defendant's

pretrial request for new counsel. Defendant was sentenced within the sentencing guidelines. We find no indication that the trial court based defendant's sentence on any factor other than proper sentencing considerations. See *People v Godbold*, 230 Mich App 508, 512, 516; 585 NW2d 13 (1998).

Next, defendant argues that he was prejudiced by the admission of evidence that he cut the complainant's telephone lines and broke her car windows. Defendant claims that because the felony information and the preliminary examination did not mention these specific acts, he had no notice that the prosecution would attempt to prove the aggravated stalking charge by evidence of these events.

This issue is not preserved. Defendant's objection to the admission of this evidence did not state that he lacked notice of the factual basis for the charges against him or that he was unfairly surprised by the evidence. *People v Darden*, 230 Mich App 597, 601-602; 585 NW2d 27 (1998). Defendant did not request a bill of particulars, nor did he move for a continuance before or during trial. Further, there is no indication that defendant sought discovery to determine what specific acts the prosecution would attempt to prove in support of the aggravated stalking charge. See *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996); *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993).

By definition, the offense of aggravated stalking comprises more than one act. "The aggravated-stalking statute proscribes stalking, which it defines in part as 'a willful course of conduct involving repeated or continuing harassment of another individual.'" *People v Coones*, 216 Mich App 721, 725; 550 NW2d 600 (1996) (Bandstra, J.); MCL 750.411i(1)(e). "'Course of conduct' means a pattern of conduct composed of a series of 2 or more separate noncontiguous acts [] evidencing a continuity of purpose." MCL 750.411i(1)(a). There is no basis in the record to conclude that defendant did not have notice of the charges against him. We find no plain error affecting defendant's substantial rights. *Taylor, supra* at 304, citing *Carines, supra* at 763-764.

Lastly, defendant argues that he was denied the effective assistance of counsel because his attorney's failure to investigate deprived him of a meritorious defense. Defendant maintains that an investigation would have revealed evidence to support his theory that the complainant fabricated her allegations. Defendant failed to move for a new trial or a *Ginther*¹ hearing. Therefore, our review is limited to errors apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

In order to establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001); *People v Rice (On Remand)*,

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

235 Mich App 429, 445; 597 NW2d 843 (1999). To establish prejudice, defendant must show that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

The record reveals that defense counsel advanced an alibi defense, and called two witnesses to corroborate defendant's testimony that he was at his mother's house on the morning in question. Defense counsel argued that the complainant's allegations were fabricated, attempted to demonstrate that the shoe found at the scene did not belong to defendant, and elicited testimony about the absence of broken glass around the window. On the basis of this record, we cannot conclude that defense counsel's performance fell below an objective standard of reasonableness. *Pickens, supra* at 33. Defendant has not shown that an investigation would have changed the outcome of the trial, and we are not persuaded of the need to remand this matter for an evidentiary hearing. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra